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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM GEORGE TRUDELL, Defendant and Appellant.	E047860 (Super.Ct.No. SWF026417) **OPINION**

APPEAL from the Superior Court of Riverside County. Timothy F. Freer, Judge. Affirmed as modified.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Gil Gonzalez and Vincent P. LaPietra, Deputy Attorneys General, for Plaintiff and Respondent.

Police responding to a domestic violence report found a woman with a bloody mouth and a small cut on her thigh. She told them that her boyfriend, defendant William George Trudell, had hit her with an ax. According to her testimony at trial, however, he merely used the ax to "tap[]"a plate that was on her lap, which broke and cut her thigh; if her mouth was bloody, it was because she bit her own lip.

A jury found defendant guilty on one count of inflicting corporal injury on a cohabitant (Pen. Code, § 273.5, subd. (a)), with an enhancement for personal use of a deadly weapon (Pen. Code, § 12022, subd. (b)(1)), and one count of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)). Defendant admitted one 5-year prior serious felony enhancement (Pen. Code, § 667, subd. (a)) and one "strike" prior (Pen. Code, §§ 667, subds. (b)-(i), 1170.12). As a result, he was sentenced to a total of 14 years in prison.

Defendant now contends:

1. The trial court erred by admitting evidence of defendant's commission of prior acts of domestic violence under Evidence Code section 1109 (section 1109).

2. The trial court erred by failing to instruct the jury on any lesser included offenses to the charge of infliction of corporal injury on a cohabitant.

3. The trial court erred by denying defendant's *Romero* motion.[1]

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[1] A "*Romero* motion" is a motion to dismiss a strike prior in the interest of justice under Penal Code section 1385. (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.)

4. The separate sentences for both infliction of a corporal injury on a cohabitant and assault with a deadly weapon violated Penal Code section 654.

The People concede that the sentence violated Penal Code section 654. We will correct this error by modifying the judgment. Otherwise, we find no prejudicial error. Accordingly, we will affirm the judgment as modified.

I

FACTUAL BACKGROUND

A. *The Charged Offenses.*

1. *The victim's statements to the police.*

On July 30, 2008, around 8:10 p.m., sheriff's deputies were dispatched to the home of Carol O'Dell in response to a domestic violence report. They found her on the front porch. She appeared to be scared and shaken. Her mouth was bloody. There was a cut on her inner right thigh. She smelled of alcohol; she said she had been drinking.

O'Dell told the officers that defendant was her boyfriend and lived with her. According to O'Dell, she had been sitting in a chair, talking on the phone. Defendant got angry and upset. He picked up an ax that was on the couch and "charged at her . . . ." He hit her with the ax; however, she was not sure which part of the ax actually struck her. He then "ran out . . . ." O'Dell also said that, when defendant gets drunk, he becomes aggressive and violent.

The ax was on the bedroom floor. There was no visible blood on it; however, it was not tested for blood. Also in the bedroom were a broken lamp and a broken Harley-

Davidson motorcycle figurine. The officers found defendant down the street, crouched behind a van on private property, evidently hiding.

2. *The victim's testimony at trial*.

At trial, O'Dell testified that she and defendant had been living together for about 20 years. On July 30, 2008, she had been sitting in a chair, talking on the phone. Meanwhile, she was eating dinner from a plate on her lap. She and defendant had both been drinking. He had an ax because they were packing to go camping.

Defendant "tapped" the lamp and the figurine with the ax, breaking them. Then, as he was walking by O'Dell, he "tapped" the plate on her lap with the ax. The plate broke and cut her leg. She was left with a scar about a quarter of an inch long.

O'Dell realized only later that she had a bloody lip. She testified, "I must have bit it or something." However, when shown a photo of herself, she testified "[i]t could have been catsup" from the hamburger she was eating.

Defendant unplugged the phone. He then "took a walk down the street." O'Dell did not know who called the police.

O'Dell testified that defendant was not mad and was not trying to hit her; he was just drunk and "goofing around." She did not remember telling the officers that defendant hit her with an ax. She may have told them that he was mad. She admitted that he had become violent when drunk "a few times" in the past.

O'Dell testified that she loved defendant and did not want him to go to jail. She was sick and on disability, and defendant helped her.

O'Dell admitted that defendant had phoned her three days before she testified but added that he had not told her what to say. He was "wonder[ing]" why she had said that he tapped the plate, because there was nothing about it in the police report. However, she told him it was the truth.

B. *Previous Domestic Violence Incidents.*

1. *The 1997 incident.*

Deputy William Rahn testified to an incident in 1997. He responded to a domestic violence call and found O'Dell upset and crying. There was blood on her lips and thumb, and there were red marks on her neck.

O'Dell explained that defendant "had beat[en] her up." They had gotten into an argument over his drug use. He had slapped her twice in the mouth, tried to choke her, and threatened to shoot her. Because she was afraid, she took a handgun that was in the house to a neighbor for safekeeping. When O'Dell's daughter called police, defendant "fled the scene." Defendant was arrested and convicted of inflicting corporal injury on a cohabitant.

In the current trial, O'Dell admitted telling the police in 1997 that defendant had beaten her up. She "might have" told them that he had threatened to shoot her.

2. *The 2003 incident.*

Deputy Stephen Foley testified to an incident in 2003. In responding to a domestic argument report, he found Angela O'Dell, Carol O'Dell's adult daughter, upset and crying.

Angela said that defendant had confronted her and her mother. He was upset because he did not want Angela (who had a drug problem) living with them anymore. He was holding a four-inch knife at waist level, pointed toward the two women. He said that "if [O'Dell] wanted her daughter, they could both go to their graves." He also told Angela "if she came back, he'd blow her head off."

The phone line had been cut. Carol O'Dell told Deputy Foley that defendant had cut it so that Angela could not use it. Deputy Foley arrested defendant, who was intoxicated. Defendant was convicted of making a criminal threat.

At trial, Angela admitted that defendant threatened to "blow [her] head off," but she did not remember him having a knife. She testified that she loved him; she considered him to be her stepfather.

Carol O'Dell testified that defendant told Angela to get out, which led to an argument. She "thought" she saw a knife but could not say that she actually did. He said "something like" the threat to blow Angela's head off, but he did not say this directly to Angela or to her.

II

THE ADMISSION OF EVIDENCE OF PRIOR INCIDENTS OF DOMESTIC VIOLENCE

Defendant contends that the trial court erred by admitting evidence of his prior domestic violence incidents under section 1109, because (1) section 1109 violates due

process; (2) the prior incidents were unduly prejudicial; and (3) the evidence included evidence of prior convictions.

A. *Additional Factual and Procedural Background.*

In a trial brief, the prosecution argued that defendant's 1997 and 2003 acts of domestic violence against the victim were admissible under section 1109. Defense counsel objected based on Evidence Code section 352, arguing, "[W]e don't believe it's probative of any issue in this case. All of the priors are nonviolent and completely different situations that the current case." The trial court admitted the evidence under section 1109.

During the trial, the prosecutor asked the trial court to "clarify" whether certified records of defendant's prior domestic violence convictions would be admissible. Defense counsel objected, saying, "That's the reason we were hoping to bifurcate the trial and keep, at least, that portion from the jury." At that point, the trial court excluded this evidence.

After all of the witnesses had testified, however, the prosecution offered Exhibits 12 and 13, which were certified copies of records of defendant's convictions resulting from the 1997 and 2003 incidents, respectively. The prosecutor argued that these were admissible under Evidence Code section 452.5. The trial court indicated that it was reconsidering its earlier ruling. Defense counsel stated, "Other than to note our general objection to admitting those priors as substantive evidence, we submit." The trial court admitted both exhibits.

B. *Statutory Background*.

Section 1109, subdivision (a)(1), as relevant here, provides: "[I]n a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352."

Under Evidence Code section 352, "[t]he court in its discretion may exclude evidence if its probative value is *substantially outweighed* by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice . . . ." (Italics added.)

"By reason of section 110[9], trial courts may no longer deem 'propensity' evidence unduly prejudicial per se, but must engage in a careful weighing process under section 352. Rather than admit or exclude every [domestic violence] offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other [domestic violence] offenses, or excluding irrelevant though inflammatory details surrounding the offense. [Citations.]" (*People v. Falsetta* (1999) 21

Cal.4th 903, 916-917 [discussing admission of other sex offenses under Evid. Code, § 1108].)

C. *Due Process*.

Defendant contends that section 1109, on its face, violates due process. He acknowledges that the California appellate courts have repeatedly upheld section 1109 in the face of such due process challenges. (E.g., *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1029 [Fourth Dist., Div. Two]; see also *People v. Falsetta*, *supra*, 21 Cal.4th at p. 912-922 [Evid. Code, § 1108 does not violate due process].) He states that he is "rais[ing] the issue of section 1109's constitutionality so as to preserve the issue for review in the federal courts." Nevertheless, as a matter of stare decisis, we must uphold section 1109 yet again.

D. *Abuse of Discretion*.

Defendant also contends that the prior incidents were unduly prejudicial under Evidence Code section 352.

"A trial court's decision to admit or exclude evidence is a matter committed to its discretion '"and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice."' [Citation.]" (*People v. Geier* (2007) 41 Cal.4th 555, 585.)

Here, the evidence was significantly probative. Once on the stand, the victim minimized defendant's conduct in committing the current offense. She tried to treat it as an attempt to break a plate, rather than as an attempt to hurt her. Thus, the prior incidents

were crucial evidence, vital to the prosecution's case, that defendant had the necessary intent to use force against the victim. (See part III, *post*.)

At the same time, the evidence was not particularly prejudicial. Defendant argues that the prior incidents were inflammatory. In the 1997 incident, defendant slapped the victim, attempted to choke her, and threatened to shoot her. However, it does not appear that he was holding or was even near a gun at the time. The victim was left with blood on her lips and her left thumb and red marks on her neck. This was not particularly inflammatory. It was not markedly more violent and, indeed, arguably less violent than defendant's current charged conduct.

In the 2003 incident, defendant approached the victim and her daughter while holding a knife. He threatened to send them "to their graves." He also conditionally threatened to shoot the daughter "if she came back . . . ." However, there was no evidence that he actually tried to use the knife to hurt the victims; they were both uninjured. Thus, once again, this was less violent than the current incident.

Defendant also argues that the evidence was particularly prejudicial because, while the jury did know that he had been convicted as a result, it did not know whether he had actually served any time in prison. Exhibits 12 and 13, however, revealed that he had been placed on probation and had served time in jail (90 days for the 1997 incident, and 365 days for the 2003 incident). Thus, the jury knew not only that he had been convicted, but specifically that he had already been punished.

Defendant points out that one of the incidents was about 11 years old. Under Section 1109, subdivision (e), "[e]vidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice." Defendant argues that the trial court never made such a finding. However, "[n]o such explicit finding is required. 'A ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereto; a separate or formal finding is unnecessary unless required by statute.' [Citations.]" (*People v. Ledesma* (2006) 39 Cal.4th 641, 710, quoting Evid. Code, § 402, subd. (c).)

Finally, defendant argues that the evidence was particularly prejudicial because the prosecutor referred to it in closing argument and argued that it was evidence of a propensity to domestic violence. However, because the evidence was more probative than prejudicial, and because section 1109 allowed the jury to consider it as evidence of propensity, the prosecutor was within her rights.

E. *Evidence of Convictions*.

Defendant contends that the trial court erred by admitting Exhibits 12 and 13, the documentary evidence of his convictions for the prior domestic violence incidents.

Section 1109 allows for the admission of "evidence of the defendant's *commission* of other domestic violence . . . ." (Evid. Code, § 1109, subd. (a)(1), italics added.) Under Evidence Code section 452.5, subdivision (b), "[a]n official record of conviction certified in accordance with subdivision (a) of Section 1530 is admissible pursuant to Section 1280

to prove the *commission* . . . of a criminal offense . . . ." (Italics added.) Accordingly, a certified record of conviction is admissible to prove that the defendant in fact committed prior acts of domestic violence.

Defendant also argues that the exhibits were prejudicial because they showed that (1) he had been charged with (although not convicted of) additional offenses, (2) he had additional prior convictions, and (3) he had violated probation. Defense counsel, however, objected to the exhibits in their entirety, on the ground that defendant would be prejudiced if the jury learned about his prior domestic violence convictions. He did not ask that the exhibits be redacted on any of these grounds. Accordingly, this contention has not been preserved for appeal. (Evid. Code, § 353, subd. (a).)

III

FAILURE TO INSTRUCT ON LESSER INCLUDED OFFENSES

Defendant contends the trial court erred by failing to instruct the jury on any lesser included offenses to infliction of corporal injury on a cohabitant (count 1).

"'In criminal cases, even absent a request, the trial court must instruct on general principles of law relevant to the issues raised by the evidence. [Citation.] This obligation includes giving instructions on lesser included offenses when the evidence raises a question whether all the elements of the charged offense were present, but not when there is no evidence the offense was less than that charged. [Citation.] The trial court must so instruct even when, as a matter of trial tactics, a defendant not only fails to request the

instruction, but expressly objects to its being given. [Citations.]" (*People v. Moye* (2009) 47 Cal.4th 537, 548-549.)

Here, the trial court gave defense counsel an opportunity to request lesser included offense instructions. He declined to do so, because he did not see any theory under which the evidence required them. He did not appear to have any deliberate tactical purpose in failing to make the request. Accordingly, this was neither a forfeiture nor invited error. (*People v. Wilson* (2008) 43 Cal.4th 1, 16.)

Infliction of corporal injury on a cohabitant is committed by willfully inflicting a corporal injury resulting in a traumatic condition on certain specified victims, including a spouse or cohabitant. (Pen. Code, § 273.5, subd. (a).) Its lesser included offenses include battery on a cohabitant (Pen. Code, §§ 242, 243, subd. (e)) and simple battery (Pen. Code, § 242). (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1457 [battery on a cohabitant]; *People v. Gutierrez* (1985) 171 Cal.App.3d 944, 952 [simple battery].) Battery requires a harmful or offensive touching but does not require that the victim sustain any actual injury. (See *People v. Pinholster* (1992) 1 Cal.4th 865, 961.) Another lesser included offense is simple assault (*Gutierrez*, at p. 952), which does not require either an actual touching (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028) or an actual injury (*People v. Golde* (2008) 163 Cal.App.4th 101, 122-123).

Certainly the infliction of corporal injury on a cohabitant requires both an actual touching and an actual injury. Nevertheless, the "traumatic condition" element is not as stringent a requirement as it may seem. A traumatic condition, for this purpose, is merely

"a condition of the body, such as a wound or external or internal injury, whether of a minor or serious nature, caused by a physical force." (Pen. Code, § 273.5, subd. (c).) In this case, even according to the victim's exculpatory testimony, defendant inflicted a corporal injury resulting in a traumatic condition. She testified that he "tapped" the plate on her lap, breaking it and causing a cut on her right thigh. By the time of trial, she still had a scar, albeit a "tiny little dinky" one. The cut was a traumatic condition as a matter of law.

The victim, however, also testified that defendant did not intend to hit her: "[He was not] trying to hit me. . . . He was goofing around."[2] The next question, then, is whether this was substantial evidence of the absence of an intent element of infliction of corporal injury on a cohabitant.

Penal Code section 273.5 defines a general intent crime. (*People v. Campbell* (1999) 76 Cal.App.4th 305, 308-309.) Thus, it requires the intent to use force against a cohabitant, but not the intent to inflict injury. (*Id*. at p. 308.)

Simple battery is also a general intent crime. (*People v. Lara* (1996) 44 Cal.App.4th 102, 107.) The act prohibited as simple battery is a harmful or offensive

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[2] Later, the victim was asked, "Do you know if he intentionally hit you with the plate[?]" The prosecutor objected, "Calls for speculation," and the trial court sustained the objection. The victim's earlier testimony, however, that defendant was not trying to hit her was admitted without objection. Even assuming it was an otherwise inadmissible opinion, it was substantial evidence on which the jury was entitled to rely. (3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 393, pp. 484-485.)

touching. Thus, the defendant must intend the touching. However, the defendant need not intend to cause harm. (*People v. Mansfield* (1988) 200 Cal.App.3d 82, 87-88.) Battery on a cohabitant incorporates the elements of battery (Pen. Code, § 243, subd. (e)); accordingly, it, too, requires that the defendant intend the touching.

Finally, simple assault is also a general intent crime. (*People v. Chance* (2008) 44 Cal.4th 1164, 1169, 1171, fn. 6.) The act prohibited as assault is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (Pen. Code, § 240.) "Logically, a defendant cannot have such an intent unless he actually knows those facts sufficient to establish that his act by its nature will probably and directly result in physical force being applied to another, i.e., a battery. [Citation.] In other words, a defendant guilty of assault must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct. He may not be convicted based on facts he did not know but should have known. He, however, need not be subjectively aware of the risk that a battery might occur." (*People v. Williams* (2001) 26 Cal.4th 779, 787-788, fn. omitted.)

Here, if defendant intended only to hit the plate and did not intend to hit the victim with either the ax or the broken plate, he would *not* be guilty of infliction of corporal injury on a cohabitant, because he did not intend to use force on the victim. However, he would *also* not be guilty of either battery on a cohabitant or simple battery, because he did not intend a harmful or offensive touching. Accordingly, if the jury believed the victim's testimony that defendant did not intend to hit her, it could not have convicted him of

either of these two lesser offenses; it would have had to acquit him. It follows that the trial court was not required to instruct on them.

With respect to simple assault, however, we come to a different conclusion. Defendant could be guilty of simple assault, even if he did not intend to use force on the victim, provided a reasonable person would have realized that a use of force on the victim would result. Accordingly, if the jury believed the victim's testimony that defendant did not intend to hit her, it could have acquitted him of infliction of corporal injury on a cohabitant, yet still have convicted him of simple assault.

It follows that the trial court erred by failing to instruct on simple assault. We turn, then, to whether the error was prejudicial. Defendant argues that the failure to instruct on a lesser included offense violates the federal Constitution. If so, the error would be subject to the federal "beyond a reasonable doubt" harmless error standard.

As a general rule, however, the federal Constitution does not require instructions on lesser included offenses. (*People v. Rundle* (2008) 43 Cal.4th 76, 142, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; see also *People v. Prince* (2007) 40 Cal.4th 1179, 1267-1268.) "There is an exception to this rule when the failure to instruct on a lesser included offense rises to the level of a federal constitutional violation because it renders the capital verdict unreliable under the Eighth Amendment. [Citation.] There also may be an exception when the error deprives the defendant of the federal due process right to present a complete defense. [Citation.]" (*People v. Rogers* (2006) 39 Cal.4th 826, 868, fn. 16.) This, however, was not a capital case. Moreover, the

failure to instruct on a lesser included offense does not implicate the right to present a complete defense unless the instruction "embod[ies] the defense theory of the case"; an instruction cannot embody the defense theory of the case when the defendant has not even requested it. (*Id*. at p. 872; cf. *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739-740 [defendant requested lesser included offense instruction]; *United States v. Unruh* (9th Cir. 1987) 855 F.2d 1363, 1372 [same].)

It follows that "'[t]he erroneous failure to instruct on a lesser included offense generally is subject to harmless error review under the [state constitutional] standard of *People v. Watson* (1956) 46 Cal.2d 818 at pages 836-837 [299 P.2d 243]. Reversal is required only if it is reasonably probable the jury would have returned a different verdict absent the error or errors complained of. [Citations.]' [Citations.]" (*People v. Prince*, *supra*, 40 Cal.4th at p. 1267.) Thus, we "may consider 'whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result.' [Citations.]" (*People v. Rogers*, *supra*, 39 Cal.4th at p. 870.)

The evidence that defendant actually intended to hit the victim was quite strong. She told the police that defendant had gotten upset and angry and had "charged at her with an ax in hand." She also told them that he hit her with the ax. He unplugged the phone, then left. The police found him apparently hiding. By unplugging the phone, leaving, and hiding, he showed a consciousness of guilt inconsistent with an accidental

touching. There was no evidence that the victim had a motive to accuse him falsely. And, of course, there was evidence that he had committed past acts of domestic violence.

By contrast, the victim's testimony that he did not intend to hit her lacked credibility. She had never told the police that defendant had merely tapped a plate in her lap. She admitted that she did not want him to go to prison and wanted him to come home instead, because he helped her around the house and paid the bills. She also admitted that she had stayed with him despite his past acts of domestic violence. Thus, her trial testimony had all the earmarks of a domestic violence victim's typical recantation.

We therefore conclude that the trial court did not err by failing to instruct on battery on a cohabitant or simple battery. While it did err by failing to instruct on simple assault, the error was harmless.

IV

ROMERO MOTION

Defendant contends that the trial court erred by denying his *Romero* motion.

A. *Additional Factual and Procedural Background.*

At the time of the crimes, defendant was 54 years old. He had the following prior convictions:

1. In 1976, grand theft, a felony. (Former Pen. Code, § 487.1.) He was placed on probation and required to serve 30 days in jail.

2. In 1990, unlawful possession of a firearm, a felony (Pen. Code, § 12021) and second degree burglary, as a misdemeanor (Pen. Code, § 459). He was placed on probation and required to serve 60 days in jail.

3. In 1998, inflicting corporal injury on a cohabitant, as a misdemeanor (Pen. Code, § 273.5, subd. (a)) and possession of a controlled substance, as a misdemeanor (Health & Saf. Code, § 11377, subd. (a)). He was placed on probation and required to serve 90 days in jail.

4. In 1998, shoplifting, a misdemeanor. (Pen. Code, § 490.5.) He was placed on probation and required to serve 45 days in jail.

5. In 2001, violation of a restraining order, a misdemeanor. (Pen. Code, § 273.6, subd. (a).) He was placed on probation and required to serve one day in jail.

6. In 2002, petty theft with a prior, as a felony (Pen. Code, §§ 488, 666) and carrying a concealed dirk or dagger, as a felony (Pen. Code, § 12020, subd. (a)(4)). He was placed on probation and required to serve 180 days in jail

7. In 2004, making a criminal threat, as a felony. (Pen. Code, § 422.) He was placed on probation and required to serve one year in jail. (This was the strike prior.)

Defendant filed a written *Romero* motion. In it, he asked the trial court to strike the strike prior. The prosecution filed a written opposition.

The trial court denied the motion. It explained: "[T]he most compelling [reason] is the recent nature . . . of the current offense. When you consider that in conjunction

with the strike prior, we're not talking about . . . a very lengthy time. We're actually talking about a fairly short period of time."

It added: "[I]n general, the defendant's actions are increasingly of a serious nature. The current case involved the defendant . . . personally using a dangerous or deadly weapon. . . .

"The circumstances of the current offense demonstrate despite the defendant's convictions, despite the repeated sentences where the defendant was placed on probation, the defendant has engaged in repeated conduct, each time escalating his conduct against . . . the victim in this case.

"The Court believes the defendant has exhibited recidivist behavior. The Court also believes the defendant is exhibiting behavior which is escalating in terms of his violence."

B. *Analysis.*

In *Romero*, the Supreme Court held that a trial court has discretion to dismiss three-strikes prior felony conviction allegations under Penal Code section 1385. (*People v. Superior Court* (*Romero*), *supra*, 13 Cal.4th at pp. 529-530.) The touchstone of the analysis is "'whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been

convicted of one or more serious and/or violent felonies.' [Citation.]" (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

"Because the circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary." (*People v. Carmony*, *supra*, 33 Cal.4th at p. 378.)

"[A] trial court's refusal or failure to dismiss or strike a prior conviction allegation under section 1385 is subject to review for abuse of discretion." (*People v. Carmony*, *supra*, 33 Cal.4th at p. 375.) "[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id*. at p. 377.)

This is not the extraordinary case that *Carmony* posited. Defendant has a long and persistent history of criminality. As the trial court observed, his crimes are of increasing seriousness; prior punishment has been ineffective. It is also significant that this is not a case in which the current offense is relatively minor. Both of the current offenses were, in themselves, strikes. (Pen. Code, §§ 667, subd. (a)(4); 1192.7, subd. (c)(23) ["any felony in which the defendant personally used a dangerous or deadly weapon"].) These facts place defendant squarely within the spirit of the three strikes law.

In arguing otherwise, defendant makes four points: (1) the circumstances of the present offense were "unclear"; (2) the victim's injuries were minor; (3) making a criminal threat is "'the least "strike-like" of all strikes'"; and (4) defendant's age, in combination with a one-strike sentence, means he will spend much of the rest of his life in prison.

Actually, although the circumstances of the present offense were disputed, it seems fairly clear that the victim's statements to the police were the truth, and her partial recantation on the stand was not. Certainly the trial court could so find. While her injuries were relatively minor, given that defendant was drunk, and given that he "charged at" the victim, he (and she) may have been just lucky.

The Legislature has determined to list making a criminal threat as a strike. (Pen. Code, §§ 667, subd. (a)(4); 1192.7, subd. (c)(38).) The particular facts and circumstances of the strike prior are not in the record. Thus, we are not prepared to say that it was not "strike-like."

Finally, granting the *Romero* motion would have reduced defendant's total sentence, at best, from 14 years to 10 years. Either way, defendant was going to spend much of the rest of his life in prison.

We therefore conclude that the trial court did not abuse its discretion by denying defendant's *Romero* motion.

V

DISPOSITION

The judgment is modified, as follows: The eight-year concurrent term imposed on count 2 (assault with a deadly or dangerous weapon) is hereby stayed. This stay shall become final if and when defendant has served the remainder of his sentence. The judgment as thus modified is affirmed. The total sentence is unchanged. The trial court is directed to prepare an amended and corrected abstract of judgment and to forward certified copies of it to the Department of Corrections and Rehabilitation. (Pen. Code, §§ 1213, 1216.)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

McKINSTER
Acting P.J.

MILLER
J.